No. 86-830

In the Supreme Court of the United States

OCTOBER TERM, 1986

CELCOM COMMUNICATIONS CORPORATION OF PENNSYLVANIA, PETITIONER

v.

FEDERAL COMMUNICATIONS COMMISSION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

MEMORANDUM FOR THE FEDERAL COMMUNICATIONS COMMISSION IN OPPOSITION

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TABLE OF AUTHORITIES

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Petitioner, an unsuccessful applicant for a license to operate a cellular telephone system in Philadelphia, challenges the court of appeals' per curiam decision affirming the Federal Communications Commission's denial of the license. Petitioner challenges the court's holding that one of petitioner's arguments was untimely and argues that the court erroneously declined to consider petitioner's challenge to the application in this case of the regulations that governed the license proceeding.

1. a. In May 1981, respondent Federal Communications Commission established by regulation a comparative hearing process to consider competing

applicants for licenses to operate "non-wireline" cellular telephone systems. *Cellular Communications Systems*, 86 F.C.C.2d 469 (1981), modified, 89 F.C.C. 2d 58, further modified, 90 F.C.C.2d 571 (1982), petition for review dismissed, No. 82-1526 (D.C. Cir. Mar. 3, 1983). The Commission rejected the alternative of selection by lottery, though it recognized that experience might show that a lottery method might have advantages. 86 F.C.C.2d at 498-499. In order to make cellular telephone service available to the public as rapidly as possible, the Commission adopted streamlined procedures for the top thirty metropolitan areas. *Id.* at 498-501.

The licensing process for the top thirty markets began in June 1982 and moved ahead rapidly. In May 1984, the Commission concluded—based on its experience with these hearings, the large number of applicants for licenses in the smaller markets, the need to expedite licensing, and the burdens of comparative hearings—that licensees should be selected by lottery for markets other than the top thirty. *Cellular Lottery Rulemaking*, 98 F.C.C.2d 175 (1984), modified, 101 F.C.C.2d 577, further modified, 50 Fed. Reg. 51522 (1985), petition for review pending *sub nom. Maxcell Telecom Plus, Inc.* v. *FCC*, No. 85-1322 (D.C. Cir. filed June 3, 1985). The Commission retained the comparative hearing process for the top thirty markets because, the process having come so far, the savings from using a lottery were insufficient to warrant abandonment of the comparative process. 98 F.C.C.2d at 179 n.12; see *Celcom Communications Corp.* v. *FCC*, 787 F.2d 609, 612 (D.C. Cir. 1986) (Pet. App. 55a-56a).

b. The proceeding at issue in this petition began on June 7, 1982, when competing applications for the non-wireline license in Philadelphia (one of the top

thirty metropolitan areas) were filed by petitioner, by respondent Automatic Wide Area Cellular Systems, Inc. (AWACS), and by three other companies that have not sought review. On January 21, 1983, a hearing was scheduled, and the issues for hearing were designated. Rebuttal papers were filed in March; hearings were held in late April and early May; and post-hearing briefs were filed in June 1983. The administrative law judge released his decision (the Initial Decision), awarding the license to AWACS, in September 1983. That decision was affirmed, with modifications, by the full Commission in a decision released January 8, 1985. Pet. App. 8a-40a. The Commission denied reconsideration in a decision released August 22, 1985. *Id.* at 41a-49a.

c. Among the arguments petitioner made to the full Commission was one concerning the relations of AWACS' three owners—LIN Cellular Communications (LIN), which owned 51%; Metromedia, Inc (Metromedia), which owned 25%; and Radio Broadcasting Company (RBC), which owned 24%. RBC played a major role in the Philadelphia paging ("beeper") market; and LIN had pending before the FCC an application to enter that market. At the time the cellular license applications were filed, as AWACS' application disclosed, Metromedia and RBC had agreed that Metromedia would acquire RBC. If LIN's paging application and the Metromedia-RBC combination were both approved, the result would be that Metromedia and LIN would be cooperating as co-owners of AWACS while competing in the paging market.

The Commission approved Metromedia's acquisition of RBC in a decision released February 11, 1983 —less than one month after the Philadelphia cellular

proceeding had been designated for hearing. Petitioner, although allegedly concerned about the potential for anticompetitive effects in the paging market of allowing Metromedia and LIN to cooperate in the cellular market, did not raise those concerns in its rebuttal papers (March 1983), at the hearings (April and May), in its post-hearing briefs (June), or in its Exceptions or Reply Exceptions seeking review of the September 1983 Initial Decision before the full Commission. On January 3, 1984, more than ten months after the Commission approved Metromedia's acquisition of RBC, petitioner raised this challenge to the AWACS license award in a motion to reopen the proceeding. The Commission rejected petitioner's request to reopen the record because, inter alia, it was untimely (Pet. App. 38a).[1]

d. In the court of appeals, petitioner challenged the FCC denial of its license applications on numerous grounds. The court affirmed the Commission ruling in a brief per curiam decision. Pet. App. 1a-6a. The court rejected all but two of the challenges, without additional discussion, as already having been resolved in other cellular telephone cases, including *Celcom Communications Corp.* v. *FCC*, *supra*, or as "otherwise * * * without merit" (Pet. App. 3a). The court also rejected petitioner's extensive arguments, which are not pressed in this Court, challenging the FCC's reliance on AWACS' market study in concluding that AWACS was superior to its competi-

[1] The Commission noted that petitioner was well aware of the relationship between Metromedia and LIN at the time the FCC approved the acquisition, "but [petitioner] did not object to the Metromedia acquisition. [Petitioner's] objection here is both late and filed in the improper forum" (Pet. App. 38a).

tors in its assessment of anticipated demand. *Id.* at 3a-5a. Finally, the court affirmed the FCC's refusal, on timeliness grounds, to hear petitioner's allegation of anticompetitive potential inherent in the Metromedia-RBC combination. *Id.* at 5a-6a, 7a.

2. The decision of the court of appeals is correct and does not conflict with any decision of this Court or of any court of appeals. Moreover, although four appeals from cellular licensing decisions are pending in the District of Columbia Circuit, the FCC has completed all cellular comparative hearings, and the court's ruling therefore is unlikely to affect the future selection of cellular licensees or other FCC proceedings. Accordingly, there is no basis for further review.

a. Petitioner first argues (Pet. 12-16) that the court of appeals erred in holding untimely petitioner's January 1984 motion to reopen the administrative proceeding for consideration of the anticompetitive effects that the Metromedia-RBC combination might have in the paging market. Petitioner contends that its motion was timely because Metromedia's acquisition of RBC was not actually consummated until early December 1983. Petitioner cites no judicial support for this contention, however, and the court of appeals correctly rejected it.

Metromedia's proposed acquisition of RBC was well known to petitioner from the outset of the cellular proceeding. The AWACS application in June 1982 described the proposed combination, and the LIN application to enter the paging market was a matter of public record throughout the proceeding below. Thus, petitioner could have, and should have, raised the issue no later than in its rebuttal papers filed prior to the hearing. Even if we assume, however, that petitioner might be excused from raising

the anticompetitive-effects issue until the FCC decided whether to approve the Metromedia-RBC transaction, petitioner's challenge was still inexcusably late. The Commission's approval was announced in February 1983. Yet petitioner remained silent for more than ten months, saying nothing until after the adverse Initial Decision. Petitioner inexcusably failed to raise the issue in its rebuttal papers, at the administrative hearing, in its post-hearing briefs, or even in its Exceptions and Reply Exceptions to the administrative law judge's decision.

Nothing about the actual consummation of the Metromedia-RBC acquisition altered the issues petitioner wanted the FCC to explore in the cellular comparative hearing—the potential anticompetitive effects in the paging market of allowing two competitors in that market to operate a joint venture in the cellular market. First, only RBC (and not Metromedia) was active in the paging market, and LIN and RBC were joint stockholders in AWACS from the start; thus, the alleged threat to competition existed even prior to Metromedia's acquisition of RBC. In any event, as far as the petition reveals, all the facts relevant to the inquiry into competition in the paging market were known prior to consummation of the purchase. Finally, even if the closing of the deal raised some new issues, the question of anticompetitive potential in the paging market was clearly ripe for consideration prior to the closing: once the proposed acquisition was announced, and certainly after it was approved by the FCC, a full exploration of petitioner's concerns about competition in the paging market was possible.

There was especially strong reason to insist on prompt raising of relevant issues in this cellular comparative proceeding. Cellular radio is a new form of

mobile communications that makes it possible to meet a greatly increasing demand for mobile telephone service. See *National Association of Regulatory Utility Commissioners* v. *FCC*, 525 F.2d 630, 634-639 (D.C. Cir.), cert. denied, 425 U.S. 992 (1976). Recognizing that "it is high time to move cellular telephone services from the FCC's regulatory process to the marketplace" (*MCI Cellular Telephone Co.* v. *FCC*, 738 F.2d 1322, 1328 (D.C. Cir. 1984)), the Commission adopted special expedited hearing procedures for choosing among mutually exclusive cellular applicants. *Cellular Communications Systems*, 86 F.C.C.2d at 498-501. Petitioner's "wait-and-see" strategy with respect to raising its concerns about the Metromedia-RBC acquisition, if accepted by the Commission, would have further delayed introduction of a competitive nonwireline cellular system in Philadelphia. In these circumstances, petitioner's waiting for the consummation of the Metromedia-RBC combination is nothing more than an excuse for having attempted to interject a new issue into a comparative proceeding that was not going its way, and the court of appeals' rejection of this effort as untimely was correct.

In any event, a remand to the Commission to consider the effects on competition in the Philadelphia paging market of the AWACS license award would now be pointless. LIN has divested itself of any interest (including its Commission license) in the paging market in the Northeast Corridor, which includes Philadelphia. See *In re Celcom Communications Corp.*, FCC 86-423 (Oct. 16, 1986), slip op. 4 n.31. Thus, LIN is no longer even a potential competitor of Metromedia, and petitioner's challenge is moot.

b. Petitioner also argues (Pet. 16-25) that the court of appeals erroneously refused to consider its

challenge to the application of the comparative criteria in this proceeding. This argument simply mischaracterizes the court's ruling.

Petitioner does not challenge the validity of the regulations that established the criteria that were to govern the licensing proceedings (Pet. 17). Rather, petitioner challenges the license decision here as not consistent with the public interest because the regulatory criteria have allegedly been "eroded" by the Commission (*ibid.*). The petition appears to identify—and in the court of appeals petitioner identified—only two ways in which this erosion has allegedly occurred: since promulgation of the comparative criteria, petitioner argues, the Commission has (i) decided not to hold licensees to the plans they submit in the licensing process and (ii) effectively confessed the irrationality of the comparative criteria, as evidenced by the Commission's adoption of a lottery method for awarding licenses in markets other than the top thirty.

These arguments, however, are precisely what the court of appeals rejected on the merits in *Celcom Communications Corp.* v. *FCC*, 787 F.2d at 611-612 (Pet. App. 54a-56a) (the *Atlanta* case). The court there held that the Commission had not departed from the original regulatory criteria governing post-award alteration of licensees' plans (787 F.2d at 612 (Pet. App. 55a))—so that this argument is really a challenge to the original criteria, a challenge petitioner here disavows. The court also held that the Commission's adoption of a lottery selection process merely reflected a new weighing of the costs and benefits of a comparative hearing process, not an abandonment of the belief that the hearing process was capable of "identifying the best applicant in the larger markets" (*ibid.* (Pet. App. 56a)).

As petitioner acknowledges, the court of appeals' rejection of its challenge to the application of the comparative criteria in this proceeding was included in the court's simple statement that "[m]ost of the arguments made by [petitioner] * * * focus on issues that have already been resolved in previous cellular telephone appeals or are otherwise without merit" (Pet. App. 3a). The court cited the *Atlanta* case in this reference to previous decisions (Pet. App. 3a n.1). Because the argument petitioner makes is precisely the same as the argument made and rejected on the merits in the *Atlanta* case, it is clear that the court of appeals' citation of the *Atlanta* case here was a rejection of the argument once again on the merits. In any event, even if the court did not intend to include this challenge among those already "resolved in previous cellular telephone appeals," this challenge falls within the remaining group expressly found "without merit." Accordingly, there is no basis for petitioner's contention that the court of appeals refused to consider the claim on the merits.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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